No. 21-1168

IN THE

Supreme Court of the United States

ROBERT MALLORY,
Petitioner,
v.
NORFOLK SOUTHERN RAILWAY CO.,
Respondent.

On Writ of Certiorari to the Pennsylvania Supreme Court

BRIEF OF AMICI CURIAE OF THE CENTER FOR AUTO SAFETY AND THE ATTORNEYS INFORMATION EXCHANGE GROUP, SUPPORTING PETITIONER

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Interest of Amici Curiae[1]

This Amici brief is submitted on behalf of The Center for Auto Safety (CAS) and the Attorneys Information Exchange Group. The issue raised in this appeal has significant jurisprudential implications for every American citizen who has a due process right to seek legal redress when she or he suffers harm at the hands of another, whether the culprit is an individual or a corporation. In this moment in time, the perplexing issue raised by this appeal is why shouldn't a nationwide corporation be subject to personal jurisdiction in each state in which it decides to obtain the benefits obtained by registering to do business and carrying out continuous and substantial business—regardless of the state in which the harm has arisen? Every day, national and multi-national corporations extend their business activities to citizens across the country, taking advantage of each State's market and protective laws, and yet there are many instances when an individual looking for legal redress cannot find it unless he or she travels to a faraway State. While the filing of papers incorporating a nationwide corporation in a particular state (State "D") allows that business entity to be haled into court predicated upon principles of *general jurisdiction*—even when the first and last time the foreign company took any action in State "D" was filing those papers—the same company is not subject to general jurisdiction when it registers to conduct business and in fact conducts substantial business in State D. Respectfully, the predicate for allowing for *general jurisdiction* in the

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[1] Counsel of Record have consented to the filing of Amicus briefs. This Brief was written entirely by the Amici without any monetary contribution from anyone.

former (incorporation), but not the latter (register to do business and conduct business) ignores both reality and the predictability of modern day business practices.

Throughout the country, nationwide and multinational businesses provide products and services to Americans in every State. While most businesses register to conduct business in each state, some do not. Of course, the scope of a company's business in a particular state will vary based upon the nature of the business, ranging from a single transaction to thousands and thousands of transactions every year. Nevertheless, current jurisdictional jurisprudence does not acknowledge this stark difference. In this instance the Respondent, after registering to do business in Pennsylvania, has for decades conducted very substantial and continuous business in the Commonwealth and yet, today they are protected against being haled into court unless the plaintiff's chosen forum is: (1) the company's state of incorporation or its principal place of business [*general jurisdiction*], or (2) a venue where the company has conducted continuous and substantial business and the harm suffered is related to the company's conduct in that venue [*specific jurisdiction]*. While these two rules of jurisdictional jurisprudence have, over the course of the past 50 years, evolved in an effort to provide predictability and fairness in accordance with due process principles, there remain a host of circumstances which leave many Americans without a reasonable forum choice <u>and</u> provide some companies unnecessary protection from judicial accountability. It is the latter circumstance that has moved your Amici

to file this brief. It is respectfully submitted that the gap between *general and specific jurisdiction* should be addressed in this instance, establishing *quasi-general jurisdiction* which will fill the existent analytical gap created by this Honorable Court's definitional resolution of cases which "fit" into either general or specific jurisdiction, but have left unsolved cases like this one that do not fit into either jurisdictional camp.

CAS was established in 1970 by Ralph Nader and the Consumers Union and it is an outgrowth of the "Corvair" scandal. After that ordeal, "Nader realized that his singlehanded, sporadic monitoring of the auto industry would be ineffective." Thus, the Center was created as an independent organization "to keep a sharp eye on the National Highway Safety Bureau" (Acton and LeMond, 1972, p. 69), now the National Highway Traffic Safety Administration, by advocating, researching, and litigating as necessary. Today the Center's original goals remain: to work for improved vehicle highway safety, reliability, and economy. While these basic tenets reflect its founders' original purposes, the Center itself has grown tremendously. Operating with more than 10,000 members and funded by individual contributions, the Center employs a small staff. CAS is a nonprofit research and advocacy organization which provides a public voice for auto safety. Our mission is to improve the safety, efficiency, reliability and cost to the consumer of vehicles, which explicitly demands that we do what we can to help reduce motor vehicle deaths, injuries and crashes. These goals often cause the Center to furnish testimony before Congressional oversight committees and sponsor independent

analysis of pending safety legislation, government safety regulations and public health issues arising because of mistakes in the design, sale or marketing of unsafe vehicles. To this end, the Center has also been involved in several lawsuits, challenging decisions of the Secretary of Transportation and the National Highway Traffic Safety Administration (NHTSA).

In addition to its direct litigation activity, the Center occasionally participates as an *amicus curiae,* when the issue relates directly to the relationship between vehicle safety, consumer protection and the role of the civil justice system in facilitating these goals. The safety of the design of motor vehicles is dependent, in part, upon allowing the American Civil Justice System to monitor when injury occurs because of poor design decisions, and providing the injured consumer access to our court system to allow jurors to decide whether compensation is warranted.

Your Amicus, the Attorneys Information Exchange Group (AIEG) is an organization of more than eight hundred (800) attorneys and their law firms who practice civil litigation throughout the United States. The members of AIEG regularly and routinely represent clients who have themselves or they have experienced the loss of family members because of the design and marketing of unsafe products. We represent the safety interests of consumers who, unfortunately, are the victims of poorly or unsafely designed products which precipitate accidents or needlessly cause injury across the United States. Headquartered in Birmingham, Alabama, AIEG was founded in the mid-1970s by attorneys representing burn victims whose vehicles

had burst into flames in the wake of collisions. In founding this organization, AIEG's pioneer members have dedicated themselves to the creation of a private cooperative entity that serves both to educate Americans who have suffered serious or catastrophic injury as a result of defectively designed motor vehicles and to coordinate the legitimate acquisition of technical information germane to these citizens' fair and honest legal representation.

Currently, motor vehicle consumers and the clients represented by AIEG face challenges like this one, in which a foreign corporation has purposefully registered to do business in the forum and carried-on substantial business in the forum and yet it objects to the jurisdiction of the forum on the basis that despite its awareness of the legal effects of registration, it claims the forum court lacks jurisdiction to hear claims brought against it—when the harm arose in a state different from the selected forum.[2] This objection

[2] An example fact pattern demonstrating the consternation created by the current scope of general versus specific jurisdiction includes the following: Ms. Jones purchased her SUV while living in Pennsylvania, but then she moved to Kansas. While driving to Pennsylvania to visit family, she is in a wreck in Indiana. She believes that her SUV's faulty design precipitated the wreck. She files suit in Kansas where the manufacturer of the SUV is registered to do business and does substantial business. Does the Kansas court under *Ford v. Montana Eighth Judicial District*, 141 S. Ct. 1017 (2021) have *specific jurisdiction*? [Perhaps not—because the harm did not "arise there".] Does the Kansas court have *general jurisdiction* because the manufacturer is registered to do business there and is present there by conducting continuous and substantial

is very much the same as that raised by Norfolk Southern. If this objection is sustained, it will make it much more difficult for consumers to bring their claims in a forum of their choosing *and* in which the tortfeasor has chosen to register to do business, obtain the legal benefits of registering and in fact conducts continuous and substantial business. Eliminating this predictable venue despite a foreign company's in-state activities will lead to added hardship to those litigants who select a convenient forum and it will provide nationwide companies with further "cover" against legitimate lawsuits.

Most vehicles sold in this country come from a foreign manufacturer or a domestic company headquartered in Michigan. Vehicles designed and built in other countries or outside of Michigan are typically exported to this country (or shipped from a remote state to the forum state by a shipper) by a wholly owned subsidiary and then distributed to every state in the Union. The current practice (which is a legitimate one) is that the manufacturer's American subsidiary or American manufacturers are incorporated in a State that has comparatively protective substantive laws minimizing tort liability (e.g., Texas and Michigan) and then marketed throughout the country via a subsidiary (or by the American manufacturer) after registering to do

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business? [Not unless it is deemed "at home".] Does the Commonwealth of Pennsylvania have specific jurisdiction? [Perhaps not—because the harm did not "arise there".] Does Indiana have specific jurisdiction? [Perhaps so—*World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 580 (1980)—but maybe not because the manufacturer's conduct in Indiana is not related to the harm.

business in each state—so that they may take advantage of the same commercial licensing privileges afforded to in-state incorporated businesses. Unfortunately, these products frequently include features (e.g., Takata airbags that explode) that cause harm. When harm arises, the consumer is <u>currently</u> restricted to filing suit against the American subsidiary (and perhaps the foreign manufacturer) or the American company where it is incorporated or has its principal place of business [*based on principles of general jurisdiction]* <u>and</u> the forum where the harm arose <u>but only if</u> it is shown that the defendant marketed its product there and the "product malfunctions there" *[based on specific jurisdiction]. Ford Motor Co. v. Montana Eight Judicial District Court*, 141 S. Ct. 1017 (2021). However, a huge gap exists and is evident in the instant case. The gap relates to how jurisdictional jurisprudence should address these circumstances: (1) the railway man, who was a Virginian when he developed cancer—because of the careless practices of Norfolk Southern—brings suit in Pennsylvania where the defendant is present and registered to do business in Pennsylvania; or (2) the harm from the flawed vehicle arises not in Montana (where the manufacturer or distributor is registered to do business and does substantial business) but while the Montanan is driving through Florida. According to the Pennsylvania Supreme Court and the Respondent and its Amici, examples (1) and (2) above do not allow for jurisdiction over the defendant (in Pennsylvania or Montana). We respectfully submit that these predictable circumstances require both a practical and legally reflective merger of principles of general

and specific jurisdiction to resolve a missing piece of the puzzle—what your Amici characterizes here as "*quasi-general jurisdiction*".

SUMMARY OF THE ARGUMENT

Your Honors' Amici respectfully submit that fair play and due process principles require that the rationale for establishing "*general jurisdiction*" based upon the filing of papers of incorporation should be applied to a corporation's filing of papers registering to do business and its continuous and substantial business in a State. In fact, the reasons for *general jurisdiction* in the State of incorporation are more aptly applied when companies like the Respondent register to do business and their business activities match the purposes why it registered to do business.

This Court has repeatedly held that *"general jurisdiction"* is obtained when the corporation is "present", and it has metaphorically equated "presence" with the corporation's domicile, place of incorporation, or principal place of business. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 2853 (2011). Yet, we are left to wonder why the filing of papers of incorporation is more important and determinative of *general jurisdiction* than the filing of papers of registration to do business along with the company carrying-on of substantial and continuous business in the forum. We think, in fact, that the following analyses proves that principles of *general jurisdiction*, should be followed and applied when a foreign business registers to do business and is shown to carry-on continuous business in that forum.

ARGUMENT

In *Goodyear*, supra., this Court summarized and explained its view of the factual distinctions between *general* and *specific jurisdiction* over an out-of-state corporation. While subsequent decisions have further refined the parameters justifying *specific jurisdiction,* the origins of the business practices allowing for *general jurisdiction* have not. In *International Shoe Co., v. State of Wash.,* 326 U.S. 310, 316-319, 158-160 S. Ct. 154, 160 (1945), the Court studied the predicate for allowing suit against a corporate entity in a forum despite the fact that the gravamen of the lawsuit occurred elsewhere, and it formulated a minimum contact test for jurisdiction, finding the Delaware corporation "present" in Washington.

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, Klein v. Board of Tax Supervisors, 282 U.S. 19, 24, 51 S.Ct. 15, 16, 75 L.Ed. 140, 73 A.L.R. 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent

> within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in Hutchinson v. Chase & Gilbert, 2 Cir., 45 F.2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. Hutchinson v. Chase & Gilbert, supra, 45 F.2d 141.
>
> 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.

Seven years later, the Court stated that "[t]he instant case takes us one step further to a proceeding in personam to enforce a cause of action not arising out of the corporation's activities in the state of the forum. Using the tests mentioned above we find no requirement of federal due process that either prohibits Ohio from opening its courts to the cause of action here presented or compels Ohio to do so.".

Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 446, 72 S. Ct. 413, 418, 96 L. Ed. 485 (1952). Fifty-nine years later, in *Goodyear*, supra. 564 U.S. at 919, the Court had occasion to reconsider the parameters of *general jurisdiction* and in doing so it relied upon an analyses between *general and specific jurisdiction* surveyed and discussed in Brilmayer & Paisley's law review article: *A General Look At General Jurisdiction,* 66 Tex. L. Rev. 721, 728 (1988) (referred to as Brilmayer). In Brilmayer's analyses, without citation to specific cases, the paradigms of *general jurisdiction* was described to include a corporation's domicile, place of incorporation and principal place of business. Addressing the reasons why the State of incorporation is a powerful basis for finding *general jurisdiction*, Brilmayer stated: [66 Tex. L. Rev. at 733-734]

> *Place of Incorporation and Principal Place of Business.*—The law treats corporations like legal persons, and the place of incorporation and the principal place of business are both analogous to domicile. In some respects, the decision to incorporate in a particular state provides a more powerful basis for adjudicatory jurisdiction than does domicile. <u>First</u>, the corporation intentionally chooses to create a relationship with the state of incorporation, presumably to obtain the benefits of that state's substantive and procedural laws. Such a choice creates a unique relationship that justifies general jurisdiction over the corporation. <u>Second</u>, the corporation, unlike an individual,

> cannot ever be absent from the state of incorporation. <u>Third</u>, even if a corporation neither does business nor maintains an office in the incorporating state, the incorporation process itself provides notice of the potential for judicial jurisdiction. <u>Finally</u>, the corporation is likely to be familiar with that state's law, arguably more familiar than an individual domiciliary would be, because the corporation presumably based its incorporation decision in part on the state's substantive law. [Emphasis added]

Your Amici believe that the factors recounted by Brilmayer (above), explaining and justifying the rationale for *general jurisdiction* over a foreign company that incorporates in the forum state is in fact <u>more appropriate</u> when the defendant registers to do business <u>*and*</u> then conducts continuous and substantial business in that venue. The proposition that *general jurisdiction* over a foreign corporation is appropriate based upon the corporation's registration to do business has been and should remain a foundational principle in jurisprudential jurisdiction. See, *Cooper Tire & Rubber Company v. McCall,* 863 S. E. 2d 81, 89 (Ga. 2021).

First, when Norfolk Southern registered to do business in Pennsylvania it acknowledged its relationship with Pennsylvania and as the record makes clear, it obtained state benefits otherwise not

available to it.[3] Second, the record clearly shows that Norfolk Southern has carried out substantial and continuous business in Pennsylvania proving its registration in the Commonwealth was purposeful and beneficial, implicitly understanding that its presence in the State provided notice of the potential for judicial jurisdiction. Third, as a sophisticated corporation, Norfolk was aware of the substantive laws of the Commonwealth of Pennsylvania and took advantage of them. [See discussion at page 44 of the Petitioner's Brief on the Merits.] Given these circumstances, it is we respectfully submit, reasonable to conclude that Pennsylvania courts may assert *general jurisdiction* over Norfolk Southern. Allowing the Petitioner to hale Norfolk Southern into court in Pennsylvania because the Respondent has exercised the rights it obtained by registering to do business in the Commonwealth, and then availed itself of the benefits of doing business in that State, is both fair and reasonable. As early as 1870, this Court found that allowing jurisdiction over a multi-state corporation, beyond its state of incorporation—and based upon service of process upon the defendant's representative in the forum selected—because the defendant was doing business in the District was properly initiated "as if it had been an independent corporation of the same locality". *Baltimore v. O.R. Co. v. Harris*, 79 U.S. 65, 84 (1870). The privilege of obtaining general jurisdiction over a non-resident corporation (or individual) is available when that non-

[3] See, A Guide to Business Registration in Pennsylvania at https://www.dos.pa.gov/BusinessCharities/Business/Documents/FEB2018%2021460%20Guide%20to%20Business%20Registration.pdf.

resident is present in the forum. Whether the non-resident's presence is there by happenstance or purposefully by registering to do business in the forum, the Court has recognized the logic of allowing the forum to resolve disputes involving the non-resident. In 1990, the Court observed the historical evolution of *general jurisdiction*, stating:

> In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an 'inevitable relaxation of the strict limits on state jurisdiction' over nonresident individuals and corporations. *Hanson v. Denckla,* 357 U.S. 235, 260, 78 S.Ct. 1228, 1243, 2 L.Ed.2d 1283 (1958) (Black, J., dissenting). States required, for example, that nonresident corporations appoint an in-state agent upon whom process could be served as a condition of transacting business within their borders, see, *e.g., St. Clair v. Cox,* 106 U.S. 350, 1 S.Ct. 354, 27 L.Ed. 222 (1882), and provided in-state "substituted service" for nonresident motorists who caused injury in the State and left before personal service could be accomplished, see, *e.g., Kane v. New Jersey,* 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916); *Hess v. Pawloski,* 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927).

* * *

> There is, we must acknowledge, one factor mentioned by Justice BRENNAN that *both* relates distinctively to the assertion of jurisdiction on the basis of personal in-state service *and* is fully persuasive—namely, the fact that a defendant voluntarily present in a particular State has a "reasonable expectatio[n]" that he is subject to suit there. *Post,* at 2124. . *Burnham v. Superior Ct. of California, Cnty. of Marin*, 495 U.S. 604, 617-625 (1990).

Over and over again, the Court has reiterated without any detailed study that *general jurisdiction* is obtainable in the corporation's place of incorporation. But why?[4] What magic resides in a corporation filing paperwork in one state to obtain "incorporation"—even if it were to then turn away from that state without purposefully carrying-out business there? [5] Respectfully, there is none. It is a fiction of the law

[4] "Courts acknowledge two types of personal jurisdiction: general or all-purpose jurisdiction, and specific or case-linked jurisdiction. . . . Both forms of jurisdiction require minimum contacts. The due process clause mentions no categories of personal jurisdiction, let alone any reference to jurisdiction. No case has explained why notions of fairness underpinning the due process clause dictate any boundary between specific and general personal jurisdiction". Downing v. Losvar, 21 Wash. App. 2d 635, 656-657, 507 P. 3d 894, 907-908 (2022).

[5] The process of incorporating a business in Delaware (Norfolk Southern's state of incorporation) is quite similar to what it was required to do to register to do business. Compare, the Delaware state requirements to those referenced in footnote 2. See, https://www.delaware.gov/howtoform/

that has been applied. In neither *Daimler* nor *Goodyear* did the Court explain how a corporation is "essentially at home" in a given forum. Instead, the Court supplied two examples: a corporation's principal place of business and its place of incorporation—or as one scholar has described it, the Court established general jurisdiction using metaphors. Crump, *The Essentially-At-Home Requirement For General Jurisdiction: Some Embarrassing Cases,* 70 Cath. U. L. Rev. 273, 277, 286 (2021).

> The Court's essentially-at home requirement for general jurisdiction is an awkward metaphor, providing in itself little guidance. The Court's two examples of fora that will fit the requirement are helpful, in that they show two concrete places for jurisdiction, and they serve to communicate the narrowness of general jurisdiction that the Court evidently has in mind. But the basic test, the essentially-at-home metaphor, remains open-ended. Given its metaphorical nature, the essentially-at-home standard dissolves into no standard at all.

Why should this fiction of the law hold any less validity and deny *general jurisdiction* when the corporation files papers in a State to conduct business and then in fact conducts continuous and substantial business in that forum? This oddity in the definitional boundaries of *general jurisdiction* was acknowledged by Justice Sotomayor in *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1560-61 (2017):

I continue to disagree with the path the Court struck in *Daimler AG v. Bauman,* 571 U.S. ——, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014), which limits general jurisdiction over a corporate defendant only to those States where it is " 'essentially at home,' " *id.,* at ——, 134 S.Ct., at 761.

*   *   *

The Court would do well to adhere more faithfully to the direction from *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), which instructed that general jurisdiction is proper when a corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id.*, at 318, 66 S.Ct. 154. Under *International Shoe,* in other words, courts were to ask whether the benefits a defendant attained in the forum State warranted the burdens associated with general personal jurisdiction. See *id.,* at 317–318, 66 S.Ct. 154. . . .

The majority's approach grants a jurisdictional windfall to large multistate or multinational corporations that operate

> across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States. See *id.,* at —— – ——, 134 S.Ct., at 759–760. What was once a holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness has now effectively been replaced by the rote identification of a corporation's principal place of business or place of incorporation. The result? It is individual plaintiffs, harmed by the actions of a farflung foreign corporation, who will bear the brunt of the majority's approach and be forced to sue in distant jurisdictions with which they have no contacts or connection.

As active participants in interstate commerce, taking advantage of the laws of the Commonwealth of Pennsylvania, why shouldn't a nonresident corporation like Norfolk Southern expect amenability to suit in any forum that is significantly affected by the corporation's commercial activities? See, *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U. S. 408, 423-424, 104 S. Ct. 1868 (Brennan, J,

dissenting). Just last year, Justices Gorsuch and Thomas joined in questioning the scope of the Court's definitional boundaries of *general jurisdiction*. In their concurring opinion in *Ford*, supra., 141 S. Ct. at 1033-1035, they questioned and implicitly urged that the Court establish a rule of law that addresses with certainty the *general jurisdictional* boundaries over out-of-state (or country) corporations:

> While our cases have long admonished lower courts to keep these concepts [general versus specific jurisdiction] distinct, some of the old guardrails have begun to look a little battered. Take general jurisdiction. If it made sense to speak of a corporation having one or two "homes" in 1945, it seems almost quaint in 2021 when corporations with global reach often have massive operations spread across multiple States. To cope with these changing economic realities, this Court has begun cautiously expanding the old rule in "'exceptional case[s].'" *BNSF R. Co.* v. *Tyrrell*, 581 U. S. ——, ——, 137 S.Ct. 1549, 1558, 198 L.Ed.2d 36 (2017).
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> *　　　*　　　*
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> *International Shoe*'s emergence may be attributable to many influences, but at least part of the story seems to involve the rise of corporations and interstate trade. See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431, 114 S.Ct. 2331, 129 L.Ed.2d 336

(1994). A corporation doing business in its State of incorporation is one thing; the old physical presence rules for individuals seem easily adaptable to them. But what happens when a corporation, created and able to operate thanks to the laws of one State, seeks the privilege of sending agents or products into another State?

Early on, many state courts held conduct like that renders an out-of-state corporation present in the second jurisdiction. And a present company could be sued for any claim, so long as the plaintiff served an employee doing corporate business within the second State. *E.g.*, *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407, 413–415, 25 S.Ct. 483, 49 L.Ed. 810 (1905). Other States sought to obviate any potential question about corporate jurisdiction by requiring an out-of-state corporation to incorporate under their laws too, or at least designate an agent for service of process. Either way, the idea was to secure the out-of-state company's presence or consent to suit. *E.g.*, *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96, 37 S.Ct. 344, 61 L.Ed. 610 (1917).

Unsurprisingly, corporations soon looked for ways around rules like these. No

one, after all, has ever liked greeting the process server. For centuries, individuals facing imminent suit sought to avoid it by fleeing the court's territorial jurisdiction. But this tactic proved "too crude for the American business genius," and it held some obvious disadvantages. See Jackson, What Price "Due Process," 5 N. Y. L. Rev. 435, 436 (1927). Corporations wanted to retain the privilege of sending their personnel and products to other jurisdictions where they lacked a charter to do business. At the same time, when confronted with lawsuits in the second forum, they sought to hide behind their foreign charters and deny their presence. Really, their strategy was to do business without being seen to do business. *Id.*, at 438 ("No longer is the foreign corporation confronted with the problem 'to be or not to be'—it can both be and not be!").

Initially and routinely, state courts rejected ploys like these. See, *e.g., Pullman Palace-Car Co. v. Lawrence*, 74 Miss. 782, 796–799, 22 So. 53, 55–56 (Miss. 1897). But, in a series of decisions at the turn of the last century, this Court eventually provided a more receptive audience. On the one hand, the Court held that an out-of-state corporation often has a right to do business in another State unencumbered by that State's registration rules, thanks to the so-called

dormant Commerce Clause. *International Text-Book Co. v. Pigg*, 217 U.S. 91, 107–112, 30 S.Ct. 481, 54 L.Ed. 678 (1910). On the other hand, the Court began invoking the Due Process Clause to restrict the circumstances in which an out-of-state corporation could be deemed present. So, for example, the Court ruled that even an Oklahoma corporation purchasing a large portion of its merchandise in New York was not "doing business" there. *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517–518, 43 S.Ct. 170, 67 L.Ed. 372 (1923). Perhaps advocates of this arrangement thought it promoted national economic growth. See Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427, 444–445 (1929). But critics questioned its fidelity to the Constitution and traditional jurisdictional principles, noting that it often left injured parties with no practical forum for their claims too. Jackson, 5 N. Y. L. Rev., at 436–438.

In many ways, *International Shoe* sought to start over. The Court 'cast ... aside' the old concepts of territorial jurisdiction that its own earlier decisions had seemingly twisted in favor of out-of-state corporations. *Burnham*, 495 U.S., at 618, 110 S.Ct. 2105. At the same time, the Court *also* cast doubt on the idea, once pursued by many state courts, that a company 'consents' to suit when it is forced

to incorporate or designate an agent for receipt of process in a jurisdiction other than its home State. *Ibid.* In place of nearly everything that had come before, the Court sought to build a new test focused on " 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S., at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)).

It was a heady promise. But it is unclear how far it has really taken us. Even today, this Court usually considers corporations "at home" and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many "headquarters." The Court has issued these restrictive rulings, too, even though *individual* defendants remain subject to the old "tag" rule, allowing them to be sued on any claim anywhere they can be found. *Burnham*, 495 U.S., at 610–611, 110 S.Ct. 2105. Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.

. . . I cannot help but wonder if we are destined to return where we began. Perhaps all of this Court's efforts since *International Shoe*, including those

> of today's majority, might be understood as seeking to recreate in new terms a jurisprudence about corporate jurisdiction that was developing before this Court's muscular interventions in the early 20th century. Perhaps it was, is, and in the end always will be about trying to assess fairly a corporate defendant's presence or consent. *International Shoe* may have sought to move past those questions. But maybe all we have done since is struggle for new words to express the old ideas. Perhaps, too, none of this should come as a surprise. New technologies and new schemes to evade the process server will always be with us. But if our concern is with " '*traditional* notions of fair play and substantial justice,' " *International Shoe*, 326 U.S., at 316, 66 S.Ct. 154 (emphasis added), not just our personal and idiosyncratic impressions of those things, perhaps we will always wind up asking variations of the same questions.

The notion that a State in which a foreign corporation has registered to do business and then actively pursues its business interests should not be allowed to hear claims against that corporation—unrelated to its activities in that forum—is both illogical and unfair. Depriving one state of authority to judge a business registered to do business because a defendant has more activity in other states works a double injustice. It deprives one state of authority notwithstanding a real interest; and the

formal application of the rule can result in the elimination of juridical jurisdiction from most states. See, Hoffheimer, *End of the Line for General Territorial Jurisdiction*, 87 Tenn. L. Rev. 419, 461-462 (2020). Allowing *general jurisdiction* to only apply in a corporation's state of incorporation even though it registers to do business and conducts substantial business in another state provides "a massive gift to corporate defendants". Cf., Hoffheimer, supra., 87 Tenn. L. Rev. at 455.

In *Goodyear*, supra. and *Daimler*, supra., this Honorable Court steered away from the historically acceptable proposition that a court may exercise *general jurisdiction* over all claims against a corporate defendant when that defendant has continuous and systematic business contacts in the forum. It did so in light of the factual claims it faced in those cases, which are quite different from the (more typical) corporate pattern of behavior present here. The more typical corporate practice of registering to do business and conducting continuous and substantial business in the forum state should be the predicate for allowing *general jurisdiction*. Courts may obtain *general jurisdiction* over a foreign corporation in a variety of ways including consent to jurisdiction, contractually agreeing to jurisdiction or stipulating to it. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03, 102 S. Ct. 2099 (1982). Why then shouldn't this generally accepted rule apply here?

Finding the Pennsylvania consent to *general jurisdiction* statute unconstitutional because it *required* Norfolk Southern to register to do business ignores the historical due process holdings of this Court. This Court has correctly ruled that state laws

which allow for jurisdiction or impose other obligations upon a corporation or individual in return for state law privileges are constitutional *upon proof of notice and the individual's full understanding of the mandated obligation*. Here are but a few examples: statutes allowing for jurisdiction over a non-resident corporation via service of process in the forum state are in accord with due process when the non-citizen has consented to be sued and appointed a resident agent for service of process. *Mississippi Pub. Corp., v. Murphree,* 326 U.S. 438, 66 S. Ct. 242 (1946); a state obtains personal *general jurisdiction* over an individual served in the state. *Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 110 S. Ct. 2105 (1990);* a state statute may impose upon a foreign corporation registered to do business in the forum a tax different from that charged domestic corporations. *Western and Southern Life Ins. Co. v. State Bd. Of Equalization of California*, 451 U.S. 648, 101 S. Ct. 2070 (1981); a State may statutorily suspend a driver's license if a driver refuses to take a breath-analysis test because the licensing privilege included notice of this obligation and punishment. *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612 (1979).

Why Shouldn't Norfolk Southern be Sued in a State Where It Registers to Do Business and Carries-On Substantial Business?

For decades, this Court has employed the purposeful availment element so that a corporation can choose whether to conduct business in a particular state before subjecting itself to jurisdiction there. The company can avoid jurisdiction all together by either

not doing business in Pennsylvania or not registering to do business. See, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174 (1985).[6] The continuing conduct of a nonresident defendant intending to preserve and enlarge an active market in the forum state constitutes purposeful activity in the forum state and indicates that the presence of the defendant in the forum state is not fortuitous, but the result of deliberate efforts. Id.

Modern commerce demands personal jurisdiction throughout the United States of large corporations. The framers of the United States Constitution, when drafting the commerce clause, desired a common market with the states debarred from acting as separable economic entities. In fulfillment of Treasury Secretary Alexander Hamilton's vision of this nation as monolithic manufacturing engine, the United States developed and now maintains the strongest, unified industrial economy in the world. *Downing v. Losvar*, 507 P.3d 894, 911–12 (Wash. Ct. App. 2022). The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a

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[6] Under Pennsylvania law, the only "penalty" for not registering to do business is that a foreign corporation may not be able to "maintain an action or proceeding in the Commonwealth". See, 15 Pa. C.S. § 411(a); 61 Pa. C. S. § 6141. Consequently, the Pennsylvania Supreme Court's characterization of the need to register to do business as *non-voluntary* is, we submit, hardly determinative. This so-called penalty is <u>not</u> what the Pennsylvania Supreme Court characterized as a choice between doing business in Pennsylvania or not doing business at all. Even without registering to do business, the Respondent may conduct business there.

State's jurisdiction. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, States should have more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions. *Id.* Granting a forum *general jurisdiction* over a corporation that registers to do business and then executes that plan by substantially carrying-on business in the State is consistent with this Court's earlier rulings because it accepts the reality that these activities are ". . . so substantial and of such a nature . . . that they exceed the "at home" characterization of a corporation's mere filing of incorporation.

> "[M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. International Life Insurance Co.,* 355 U.S. 220, 222-223, 78 S. Ct. 199 (1957)

The proposition that *general jurisdiction* should be expanded over registered foreign

corporations conducting significant business in a State is consistent with the "traditional notions of fair play and substantial justice", which control the inquiry under the Due Process Clause. Allowing any lawsuit to be filed against a foreign corporation which has registered to do business and is an active participant in a State's commerce is only fair and reasonable because of the corporation's significant presence. And chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation's commercial activities. *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 422-23, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (Brennan, J., dissenting). A nonresident corporation should expect amenability to suit in any forum where it registers to do business and then pursues significant commercial activities. *Id.* After all, registration to do business and then carrying out those activities can and should be easily characterized as being "present" in the forum. See, Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136-1137 (1966).

The due process clause should not be wielded as a territorial shield to avoid interstate obligations voluntarily assumed. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Because modern transportation and communications render defending oneself in another state less burdensome, a party will generally not suffer unfairness by litigating in another forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474, 105 S.Ct. 2174. Only in rare cases will the

exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state. *Asshauer v. Farallon Capital Partners, LP*, 319 S.W.3d 1, 8 n.7 (Tex. App. 2008). And, most importantly, when a nationwide business enterprise registers to do business, it has signified its intent to be present, which should in turn provide a consistency missing from merely filing papers of incorporation.

Establishing a rule that a foreign corporation which registers to do business and then conducts substantial and continuous business in the forum may be subject to *general jurisdiction* eliminates the tension now existent between the limiting descriptors of the "at home" test and allowing for *general jurisdiction* when a party is present and served within a state's borders. These two examples, when fairly merged, call for Norfolk Southern to be subject to *general jurisdiction* because it is "presence" in Pennsylvania.

CONCLUSIONS

Your Amici respectfully urge this Honorable Court to reverse the holding of the Pennsylvania Supreme Court and acknowledge that principles of *general jurisdiction* apply here because of the Respondent's purposeful registration to conduct business and its continuous and substantial business in the State.

Respectfully submitted,

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